

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CHAD WINDHAM MITCHELL,

Plaintiff,

v.

CARSON CITY SHERIFF'S
OFFICE, *et al.*,

Defendants.

Case No. 3:22-cv-00159-MMD-CSD

SCREENING ORDER ON
SECOND AMENDED COMPLAINT

(ECF No. 23)

Pro se Plaintiff Chad Windham Mitchell, who was formerly detained at the Carson City Sheriff's Detention Facility ("CCDF"),¹ has submitted a second amended civil rights complaint under 42 U.S.C. § 1983 (ECF No. 23 ("SAC")), a motion to supplement (ECF No. 24), and a motion for subpoena duces tecum and discovery (ECF No. 25). The Court denies the motion for subpoena duces tecum and discovery as premature, screens the SAC under 28 U.S.C. § 1915A, and considers the motion to supplement.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential

¹According to a notice of change of address, Plaintiff is currently in custody at the Washoe County Detention Facility. (ECF No. 19.)

1 elements: (1) the violation of a right secured by the Constitution or laws of the United
2 States; and (2) that the alleged violation was committed by a person acting under color
3 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

4 In addition to the screening requirements under § 1915A, under the Prison
5 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s
6 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails
7 to state a claim on which relief may be granted, or seeks monetary relief against a
8 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a
9 complaint for failure to state a claim upon which relief can be granted is provided for in
10 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
11 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a
12 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
13 the complaint with directions as to curing its deficiencies, unless it is clear from the face
14 of the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
15 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

16 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
17 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
18 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
19 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
20 756, 759 (9th Cir. 1999). In making this determination, the Court takes as true all
21 allegations of material fact stated in the complaint, and the Court construes them in the
22 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
23 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
24 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
25 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
26 must provide more than mere labels and conclusions. See *Bell Atl. Corp. v. Twombly*,
27 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
28 insufficient. See *id.*

1 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
2 that, because they are no more than mere conclusions, are not entitled to the assumption
3 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide
4 the framework of a complaint, they must be supported with factual allegations.” *Id.* “When
5 there are well-pleaded factual allegations, a court should assume their veracity and then
6 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining
7 whether a complaint states a plausible claim for relief . . . [is] a context-specific task that
8 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

9 Finally, all or part of a complaint filed by an incarcerated person may be dismissed
10 *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This
11 includes claims based on legal conclusions that are untenable (*e.g.*, claims against
12 defendants who are immune from suit or claims of infringement of a legal interest which
13 clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*,
14 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989);
15 *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

16 **II. SCREENING OF SAC**

17 In the SAC, Plaintiff sues multiple Defendants for events that took place while
18 Plaintiff was a pretrial detainee at CCDF. (ECF No. 23 at 1.) Plaintiff sues Defendants
19 Captain Mays, Sergeant Rivera, Sergeant Bindley, and commissary employee John Doe.
20 (*Id.* at 1-2.) Plaintiff brings two claims and seeks monetary and injunctive relief. (*Id.* at 2-
21 21.)

22 Plaintiff alleges the following. Plaintiff filed a petition for writ of habeas corpus in
23 case number 22OC000601B in the First Judicial District Court of Nevada in and for
24 Carson City (“FJDC”) relating to his “conditions of confinement” at CCDF. (*Id.* at 4.)
25 Specifically, Plaintiff’s petition related to: “1) denial of legal materials, 2) tampering and
26 interception of ‘legal mail,’ 3) denial of legal research, 4) . . . exposure to other inmates’
27 ‘biohazard fluids,’ . . . 5) failure to provide for Covid protocols, and 6) inadequate cleaning
28 and sanitation within the facility.” (*Id.*) In that case, Plaintiff moved for a court order

1 recognizing his pauper status so that under CCDF policy, CCDF was required to provide
2 him with access to legal materials and copies that he needed to litigate his petition. (*Id.*
3 at 9.) However, Plaintiff's motion was denied because he was unable to provide proof of
4 service to the opposing party, due to (1) only being allowed one envelope by Defendant
5 commissary employee John Doe under CCDF policy and (2) CCDF policy not allowing
6 copies to be made. (*Id.* at 10-11.) Plaintiff's habeas petition was later denied due to
7 Plaintiff's "failure to state [a] claim . . . and failure to provide proof of exhausted remedies."
8 (*Id.* at 11.) Plaintiff alleges that the denial of his petition was the result of CCDF's policy
9 restricting inmates' access to legal research or legal assistance and CCDF's policy
10 disallowing inmates to make copies. (*Id.*) Plaintiff alleges that Defendant Captain Mays is
11 tasked with enforcing these policies. (*Id.* at 3.)

12 In an unrelated case, the state filed criminal charges against Plaintiff in the Second
13 Judicial District Court of Nevada in and for Washoe County ("SJDC") in case number
14 CR18-2118. (*Id.* at 5.) Plaintiff drafted and provided his public defender in that case with
15 a petition for writ of habeas corpus regarding violations of Plaintiff's due process rights
16 that resulted from a detective (1) giving drugs to an informant to give to Plaintiff and (2)
17 arresting Plaintiff for possession of those drugs. (*Id.* at 5-6.) Plaintiff sent a request for
18 envelopes and postage to be able to communicate with his public defender and instruct
19 him to file the proposed petition. (*Id.* at 6.) Defendant Sergeant Rivera responded that
20 "the jail is not your legal team." (*Id.*) Plaintiff then sent a request to commissary for
21 envelopes and postage, but Defendant commissary employee John Doe responded, "not
22 through commissary." (*Id.* at 7.) Because Plaintiff was denied envelopes and postage for
23 his communication with his public defender, Plaintiff's petition for writ of habeas corpus in
24 his criminal case was never filed. (*Id.*) On April 1, 2022, Plaintiff mailed a letter to the
25 SJDC in this same criminal case, but three days later, when Plaintiff received his incoming
26 mail, he found his letter inside a CCDF envelope, indicating that his letter had been
27 opened and was never sent to the SJDC. (*Id.* at 10.)
28

1 After Plaintiff was able to place an order for postage, envelopes, and pens with
2 commissary, he was at a court proceeding when the items were attempted to be
3 delivered. (*Id.*) Upon Plaintiff's return to CCDF, he was experiencing symptoms of Covid,
4 so he was placed in isolation. (*Id.*) Plaintiff sent several requests for his items to be
5 delivered to him in isolation, but Defendant commissary employee John Doe responded
6 that there were no special deliveries. (*Id.* at 7-8.) Plaintiff filed several more requests and
7 eventually explained that the delay of his items meant he was "unable to file [his] own
8 motions . . . to quash and . . . to fire counsel." (*Id.* at 8.) Defendant Sergeant Rivera told
9 Plaintiff that since Plaintiff was "threatening staff and making allegations," Plaintiff's future
10 requests were going to be "ignored and returned." (*Id.*) Plaintiff alleges that this decree
11 resulted in him being refused CCDF's grievance process. (*Id.* at 19.)

12 Plaintiff made a request for legal research to file his first amended complaint
13 ("FAC") in this case, but his request was returned with the following explanation: "see
14 whoever is helping [Plaintiff] with [his] case." (*Id.* at 12-13.) Plaintiff alleges that this
15 statement was retaliatory because Plaintiff had "been in their custody for a year and
16 officers know that it [was] a fact [Plaintiff was] doing it [himself]." (*Id.* at 13.) Plaintiff also
17 asked for paper to file his FAC, but Defendant commissary employee John Doe denied
18 the request, stating that "paper is not an indigent item." (*Id.* at 18.) Plaintiff alleges that
19 this refusal was "for no other reason than [his] filing [a] 1983 action," in which Defendant
20 commissary employee John Doe is a named defendant. (*Id.*)

21 On July 22, 2022, Plaintiff asked Defendant Sergeant Bindley if Plaintiff had
22 received any legal mail, and he was told he had not. (*Id.* at 14.) However, Plaintiff
23 contacted a friend, who informed Plaintiff that the friend had sent mail to Plaintiff, and that
24 the tracker information showed that the mail had been "refused as unwanted." (*Id.*)
25 Plaintiff submitted a request on the issue and told Defendant Sergeant Bindley that the
26 mail was going to be remailed by his friend. (*Id.* at 15.) When the resent mail arrived, it
27 was rejected as being unauthorized, but instead of returning it to the sender under CCDF
28 policy, Defendant Sergeant Bindley held it in the mail area. (*Id.*) Plaintiff submitted many

1 grievances, resulting in Defendant Sergeant Bindley, who knew that the mail contained
 2 research for this case, altering the grievance procedure to (1) delay Plaintiff's civil rights
 3 complaint, (2) ensure that Plaintiff would be unable to exhaust his remedies, and (3) put
 4 Plaintiff "in jeopardy of being subjected to disciplin[e]" for filing too many grievances on
 5 the same issue. (*Id.* at 15-16, 18.) Plaintiff also received several pieces of other legal mail
 6 regarding this case, but those pieces of mail were inexplicably damaged, opened, and
 7 delayed. (*Id.* at 17.) Plaintiff contends that Defendant Sergeant Bindley's actions
 8 regarding Plaintiff's mail served "no legitimate penological goal," but were made only "to
 9 protect himself and other named defendants from [Plaintiff's] legal actions in this case."
 10 (*Id.* at 20.)

11 Based on these allegations, Plaintiff asserts a Fourteenth Amendment claim for
 12 denial of access to the courts and a First Amendment claim for retaliation. (*Id.* at 3, 17.)

13 **A. Fourteenth Amendment: Denial of Access to the Courts**

14 Inmates have a constitutional right of access to the courts. See *Lewis v. Casey*,
 15 518 U.S. 343, 346 (1996). This right "requires prison authorities to assist inmates in the
 16 preparation and filing of meaningful legal papers by providing prisoners with adequate
 17 law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*,
 18 430 U.S. 817, 828 (1977). This right, however, "guarantees no particular methodology but
 19 rather the conferral of a capability—the capability of bringing contemplated challenges to
 20 sentences or conditions of confinement before the courts." *Lewis*, 518 U.S. at 356. It is
 21 this "capability, rather than the capability of turning pages in a law library, that is the
 22 touchstone" of the right of access to the courts. *Id.* at 356-57.

23 To establish a violation of the right of access to the courts, an inmate must
 24 establish that he or she has suffered an actual injury, a jurisdictional requirement that
 25 flows from the standing doctrine and may not be waived. *Id.* at 349. An "actual injury" is
 26 "actual prejudice with respect to contemplated or existing litigation, such as the inability
 27 to meet a filing deadline or to present a claim." *Id.* at 348. Thus, "[t]o state a claim that the
 28 denial of materials, such as postage or envelopes, violated [an inmate's] right to access

1 the courts, there must be a showing that the denial of the materials denied the [inmate]
2 the ability to perfect and pursue legal action, i.e. actual injury to court access.” *Jackson*
3 *v. Quick*, Case No. 19-cv-01591, 2020 WL 9601697, at *5 (E.D. Cal. Apr. 16, 2020)
4 (citations omitted). Delays in providing legal materials or assistance that result in actual
5 injury are “not of constitutional significance” if “they are the product of prison regulations
6 reasonably related to legitimate penological interests.” *Lewis*, 518 U.S. at 362. The right
7 of access to the courts is limited to non-frivolous direct criminal appeals, habeas corpus
8 proceedings, and § 1983 actions. *Id.* at 353 n.3, 354-55.

9 The Court finds that Plaintiff fails to state a colorable Fourteenth Amendment claim
10 based on denial of access to the courts. Based on Plaintiff’s allegations, he was: (1)
11 denied his petition for writ of habeas corpus and his motion for a court order recognizing
12 his pauper status by the FJDC in case number 22OC000601B because he was unable to
13 conduct legal research to substantiate his petition or make copies to prove that he had
14 previously exhausted his remedies and to provide a copy of the motion to the opposing
15 party; (2) denied the opportunity to file a petition for writ of habeas corpus, a motion to
16 quash, and a motion to terminate counsel in his SJDC criminal case because he was
17 unable to communicate with his public defender or get his commissary items while placed
18 in isolation, and (3) unable to get needed legal research materials for his FAC in the
19 instant case.

20 First, Plaintiff fails to allege an actual injury regarding his FJDC case. Because a
21 petition for writ of habeas corpus may not challenge conditions of confinement, which is
22 exactly what Plaintiff contends he attempted to challenge in his petition to the FJDC,
23 Plaintiff’s petition for writ of habeas corpus was frivolous. *See Bowen v. Warden*, 686
24 P.2d 250, 250 (Nev. 1984) (stating that “a petition for writ of habeas corpus may challenge
25 the validity of current confinement, but not the conditions thereof”). And because the
26 underlying petition in the FJDC case was frivolous, Plaintiff fails to allege that the denial
27 of his request for pauper status in that same case amounted to an actual injury, given that
28 he does not allege that pauper status would have been recognized after the underlying

petition was dismissed. Second, because the right of access to the courts is limited to direct criminal appeals, habeas corpus proceedings, and § 1983 actions, Plaintiff's alleged injuries in his pending criminal case in the SJDC are not properly raised in the instant action.² See *Lewis*, 518 U.S. at 355 ("Impairment of any *other* litigating capacity [other than attacking a sentence or challenging the conditions of confinement] is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."). Third, because this Court already considered Plaintiff's FAC in this case and is now considering his SAC, Plaintiff fails to allege facts supporting an actual injury concerning this § 1983 action.

Because Plaintiff does not adequately allege any actual injury, his denial-of-access-to-the-courts claim is dismissed without prejudice.

B. First Amendment: Retaliation

Inmates have a First Amendment right to file prison grievances and to pursue civil rights litigation in the courts. See *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004). "Without those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices. And because purely retaliatory actions taken against a prisoner for having exercised those rights necessarily undermine those protections, such actions violate the Constitution quite apart from any underlying misconduct they are designed to shield." *Id.*

To state a viable First Amendment retaliation claim in the prison context, a plaintiff must allege: "(1) [a]n assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his [or her] First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Id.* at 567-68. For First Amendment retaliation purposes, "protected conduct" does not need to be "tethered to the speech or associational freedoms secured by that Bill of Rights provision." *Blaisdell*

²Notably, Plaintiff may be able to pursue these allegations in a different type of action, potentially a post-conviction petition in state court.

1 *v. Frappiea*, 729 F.3d 1237, 1242 (9th Cir. 2013). Instead, “a claim for retaliation can be
2 based upon the theory that the government imposed a burden on the plaintiff, more
3 generally, because he exercise[d] a constitutional right.” *Id.* (internal quotation marks
4 omitted). In addition, total chilling is not required to state a retaliation claim; it is enough if
5 an official’s acts would chill or silence a person of ordinary firmness from future First
6 Amendment activities. *See Rhodes*, 408 F.3d at 568-69.

7 The Court finds that Plaintiff states a colorable First Amendment retaliation claim
8 against Defendants Sergeant Rivera, commissary employee John Doe, and Sergeant
9 Bindley. First, based on Plaintiff’s allegations, in response to Plaintiff’s protective conduct
10 of invoking his right to the courts by requesting legal materials—postage and envelopes—
11 from commissary, Defendant Sergeant Rivera took adverse action by ignoring all of
12 Plaintiff’s grievances since September 2021. Based on the allegations, this adverse
13 action hindered Plaintiff’s access to CCDF’s grievance procedure and was not based on
14 any legitimate correctional goal. Second, based on Plaintiff’s allegations, in response to
15 Plaintiff’s protective conduct of filing this action, Defendant commissary employee John
16 Doe took adverse action by unreasonably denying Plaintiff’s request for paper to complete
17 his FAC. And based on the allegations, this adverse action meant that Plaintiff was forced
18 to obtain paper by trading food with other inmates and was not based on any legitimate
19 correctional goal. Third, based on Plaintiff’s allegations, in response to Plaintiff’s
20 protective conduct of filing this action, Defendant Sergeant Bindley took adverse action
21 by withholding Plaintiff’s mail containing research for the instant case, opening Plaintiff’s
22 legal mail, and altering CCDF’s grievance procedure. And based on the allegations, these
23 actions frustrated Plaintiff’s ability to litigate his various cases and were not based on any
24 legitimate correctional goal.

25 However, the Court finds that Plaintiff fails to state a colorable First Amendment
26 retaliation claim against Defendant Captain Mays. Plaintiff’s only allegation against
27 Defendant Captain Mays is that he had “direct knowledge” of the retaliations. (ECF No.
28 23 at 5.) Plaintiff provides no specific allegations demonstrating that Defendant Captain

Mays was on notice prior to or during the retaliatory actions and acquiesced to the other Defendants' unconstitutional actions. See *Iqbal*, 556 U.S. at 676; *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012) ("The absence of specifics is significant because, to establish individual liability under 42 U.S.C. § 1983, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (stating that a defendant is liable under 42 U.S.C. § 1983 "only upon a showing of personal participation by the defendant"); cf. *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012) (concluding that "allegations of facts that demonstrate an immediate supervisor knew about the subordinate violation another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations").

Plaintiff's First Amendment retaliation claim will proceed against Defendants Sergeant Rivera, commissary employee John Doe when Plaintiff learns of his identity,³ and Sergeant Bindley.

III. MOTION TO SUPPLEMENT

This Court previously gave Plaintiff leave to amend, but it did "not grant him leave to amend in any way he sees fit." (ECF No. 16 at 12.) Plaintiff moves to supplement his SAC with an additional claim regarding the opening of his outgoing mail, explaining that he had not previously recognized this claim given his lack of legal resources. (ECF No. 24.) The Court construes Plaintiff's motion as a motion to amend his pleading under Rule 15(a) of the Federal Rules of Civil Procedure. This Court balances five factors when considering a motion to amend: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) the futility of the amendment; and (5) whether the plaintiff has previously amended his complaint. *Desertrain v. City of L.A.*, 754 F.3d 1147, 1154 (9th

³Although the use of "Doe" to identify a defendant is not favored, flexibility is allowed in some cases where the identity of the parties will not be known prior to filing a complaint but can subsequently be determined through discovery. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). If the true identity of the Doe Defendant comes to light during discovery, Plaintiff may move to substitute the true name of the Doe Defendant to assert claims against the Doe Defendant at that time.

1 Cir. 2014). Given that (1) this Court must “freely give leave when justice so requires,” Fed.
2 R. Civ. P. 15(a)(2), (2) Plaintiff’s motion is not brought in bad faith, will not cause undue
3 delay, and will not prejudice the opposing party, and (3) the supplemental claim does not
4 add any new facts not already contained in the SAC, the Court grants the motion.
5 Plaintiff’s third claim, asserting a First Amendment right regarding legal mail, will be
6 incorporated with the SAC.

7 Prisoners have a First Amendment right to send and receive mail. *Witherow v.*
8 *Paff*, 52 F.3d 264, 265 (9th Cir. 1995). Prisoners also have “a protected First Amendment
9 interest in having properly marked legal mail opened only in their presence.” *Hayes v.*
10 *Idaho Corr. Ctr.*, 849 F.3d 1204, 1211 (9th Cir. 2017) (explaining that “[w]hen a prisoner
11 receives confidential legal mail that has been opened and re-sealed, he may
12 understandably be wary of engaging in future communication about privileged legal
13 matters”); see also *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (explaining that
14 “the practice of requiring an inmate to be present when his legal mail is opened is a
15 measure designed to *prevent* officials from reading the mail in the first place” (emphasis
16 in original)). However, prison officials may, consistent with the First Amendment, require
17 (1) that mail from attorneys be identified as such and (2) open such correspondence in
18 the presence of the prisoner for visual inspection. *Wolff v. McDonnell*, 418 U.S. 539, 576-
19 77 (1974). Additionally, “[m]ail from the courts, as contrasted to mail from a prisoner’s
20 lawyer, is not legal mail.” *Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996), *opinion*
21 *amended on denial of reh’g*, 135 F.3d 1318 (9th Cir. 1998). A prison need not treat all
22 mail sent to government agencies and officials as legal mail. See *O’Keefe v. Van*
23 *Boening*, 82 F.3d 322, 326 (9th Cir. 1996).

24 The Court finds that Plaintiff states a colorable First Amendment claim regarding
25 legal mail against Defendants Sergeant Rivera and Sergeant Bindley. First, based on the
26 allegations, Defendant Sergeant Bindley refused to put postage on a piece of Plaintiff’s
27 outgoing legal mail even though Plaintiff followed CCDF’s legal mail policy. Based on the
28 allegations, this refusal hindered Plaintiff’s First Amendment right to send mail. Second,

1 based on the allegations, Defendant Sergeant Rivera delayed remailing a legal package
2 that had been returned due to lack of adequate postage, and opened Plaintiff's sealed
3 legal mail and gave it back to him inside a different envelope. Again, based on the
4 allegations, the former allegation frustrated Plaintiff's First Amendment right to send mail.
5 And the latter allegation, *i.e.*, that Plaintiff's protected mail was opened outside his
6 presence, is sufficient by itself to survive screening. *See Hayes*, 849 F.3d at 1212
7 (explaining that "[n]othing further is required" regarding screening a First Amendment
8 claim of legal mail other than a plausible allegation that the plaintiff's "protected mail was
9 arbitrarily or capriciously opened outside his presence").

10 However, the Court finds that Plaintiff fails to state a colorable First Amendment
11 claim regarding legal mail against Defendant Captain Mays. Regarding Plaintiff's
12 allegation that Defendant Sergeant Rivera delayed remailing a legal package that had
13 been returned due to lack of adequate postage, Plaintiff alleges that Defendant Captain
14 Mays is Defendant Sergeant Rivera's supervisor and is liable under a supervisor liability
15 theory. To state a valid § 1983 claim against a supervisor, "a plaintiff must plead that each
16 Government-official defendant, through the official's own individual actions, has violated
17 the Constitution." *Iqbal*, 556 U.S. at 676. Plaintiff fails to allege what actions Defendant
18 Captain Mays took or did not take that violated Plaintiff's constitutional rights. Indeed,
19 Plaintiff does not allege, among other things, that Defendant Captain Mays had
20 knowledge of the delayed mailing, failed to train Defendant Sergeant Rivera in the
21 handling of mail, or instituted a policy that resulted in the delayed mail.

22 Plaintiff's First Amendment claim regarding legal mail will thus proceed against
23 Defendants Sergeant Rivera and Sergeant Bindley.

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1 **IV. CONCLUSION**

2 It is therefore ordered that the motion for subpoena duces tecum and discovery
3 (ECF No. 25) is denied as premature.

4 It is further ordered that the motion for supplemental inclusion (ECF No. 24) is
5 granted.

6 It is further ordered that Clerk of Court file a Revised Second Amended Complaint
7 into one docket entry that consists of the SAC (ECF No. 23) and claim 3 from the
8 supplement (ECF No. 24 at 4–7). The Revised Second Amended Complaint is the
9 operative complaint, and the Clerk of Court is directed to send Plaintiff a courtesy copy of
10 it.

11 It is further ordered that Defendant Captain Mays is dismissed without prejudice
12 from the SAC.

13 It is further ordered that the Fourteenth Amendment claim for denial of access to
14 the courts is dismissed without prejudice.

15 It is further ordered that the First Amendment claim for retaliation will proceed
16 against Defendants Sergeant Rivera, commissary employee John Doe (when Plaintiff
17 learns of his identity), and Sergeant Bindley.

18 It is further ordered that the First Amendment claim regarding legal mail will
19 proceed against Defendants Sergeant Rivera and Sergeant Bindley.

20 It is further ordered that the Clerk of Court will issue summonses for Defendants
21 Sergeant Rivera and Sergeant Bindley and deliver the same to the U.S. Marshal for
22 service. The Clerk also will send sufficient copies of the Revised Second Amended
23 Complaint (ECF No. 23 plus ECF No. 24 at 4–7) and this order to the U.S. Marshal for
24 service on Defendants.

25 It is further ordered that the Clerk send to Plaintiff two USM-285 forms. Plaintiff will
26 have 30 days within which to give the U.S. Marshal the required USM-285 forms with
27 relevant information as to each Defendant on each form.
28

1 It is further ordered that within 20 days after receiving from the U.S. Marshal a copy
2 of the USM-285 forms showing whether service has been accomplished, Plaintiff must
3 file a notice with the Court identifying which Defendant(s) were served and which were
4 not served, if any. If Plaintiff wishes to have service again attempted on an unserved
5 Defendant(s), then a motion must be filed with the Court identifying the unserved
6 Defendant(s) and specifying a more detailed name and/or address for said Defendant(s),
7 or whether some other manner of service should be attempted.

8 It is further ordered that Plaintiff will serve upon Defendant(s)—or, if an appearance
9 has been entered by counsel, upon their attorney(s)—a copy of every pleading, motion,
10 or other document submitted for consideration by the Court. If Plaintiff electronically files
11 a document with the Court's electronic-filing system, no certificate of service is
12 required. Fed. R. Civ. P. 5(d)(1)(B); LR IC 4-1(b); LR 5-1. However, if Plaintiff mails the
13 document to the Court, Plaintiff shall include with the original document submitted for filing
14 a certificate stating the date that a true and correct copy of the document was mailed to
15 the Defendants or counsel for the Defendants. If counsel has entered a notice of
16 appearance, Plaintiff shall direct service to the individual attorney named in the notice of
17 appearance, at the physical or electronic address stated therein. The Court may disregard
18 any document received by a district judge or magistrate judge which has not been filed
19 with the Clerk, and any document received by a district judge, magistrate judge, or the
20 Clerk that fails to include a certificate showing proper service when required.

21 DATED THIS 13th Day of April 2023.



22
23
24 MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE